

Herbert E. Gregory v. U.S. General Accounting Office

Docket No. 20-101-15-82

Date of Decision: August 29, 1984

Cite as: Gregory v. GAO (8/29/84)

Before: Bowers, Presiding Member

Off-duty Misconduct

Efficiency of Service

Improper Personal Conduct

Discipline

DECISION OF PRESIDING MEMBER

Petitioner, Herbert Gregory, Jr., petitioned the Personnel Appeals Board for review of the indefinite suspension without pay imposed by the General Accounting Office on May 9, 1982.

On April 28, 1982, David Littleton, Regional Manager, Washington Regional Office, notified Mr. Gregory in writing that "in order to promote the efficiency of the service I am proposing that you be suspended indefinitely from duty and pay from your position of GAO Evaluator, GS-347-12, for reported criminal misconduct" occurring on April 25 when Mr. Gregory was off-duty. After affording Mr. Gregory an opportunity to respond, on May 6, 1982, Felix R. Brandon, II, Director of Personnel, wrote to Mr. Gregory informing him that Mr. Littleton's proposal had been adopted and that Mr. Gregory was indefinitely suspended as of May 9, 1982. Mr. Brandon stated, in part:

The record before us at this time shows a charge of attempted rape, assault and battery, and sexual offense -- first degree. However, the police have indicated that these charges may be modified. I have fully considered the entire record, including your response, and find that the confusion and doubt are of such magnitude and the police charges against you so serious that it is my decision that you be suspended from duty and pay for an indefinite period of time. During the period of this suspension, the U.S. General Accounting Office will remain in contact with the appropriate authorities and will consider its course of action as the situation develops. However, you also should advise this office of any changes in your status or specifics of charges brought against you. This action is being taken to promote the efficiency of the service.

The letter also informed Mr. Gregory of his right to appeal the suspension to the PAB within 20 days of its effective date. Mr. Gregory did not appeal at that time.

On October 23, 1982, Mr. Gregory was tried in the Cecil County Circuit Court, Elkton, Maryland, on charges of battery, assault, and assault with intent to commit a second-degree sexual offense. A representative of GAO's Office of Security and Safety attended the trial. The trial resulted in a deadlocked jury and a declaration of mistrial.

Subsequently, Mr. Gregory wrote to GAO and requested that he be reinstated in view of the mistrial. On November 17, 1982, Mr. Brandon denied the request, and stated: "The mistrial determination by the Cecil County Court, and the lack of a decision by the State's Attorney on whether a retrial will be held has not alleviated the purpose of the suspension, and the charges pending against Mr. Gregory remain basically the same."¹

Mr. Gregory thereupon filed a petition for review with the PAB General Counsel on December 8, 1982. A Right to Appeal Letter was issued on February 18, 1983, and Mr. Gregory filed his appeal with the Board on March 17, 1983. GAO moved to dismiss the petition as untimely filed. In her Order of May 16, 1983, the Presiding Member ruled that Mr. Gregory's petition was untimely with respect to the initial suspension on May 9, 1982, but was timely insofar as he sought review of GAO's denial of reinstatement in November 1982 following the mistrial.

The issue to be tried, as set forth in the Order, was "whether GAO's action in denying Mr. Gregory reinstatement in November 1982 was proper, given the facts and circumstances that were known, or should have been known, by GAO at that time." Specifically, 5 U.S.C. §7513(a) provides that an agency may suspend an employee for more than 14 days "only for such cause as will promote the efficiency of the service."² The burden is on the agency to prove that it had a reasonable basis for believing that the alleged misconduct occurred and to prove a nexus between the off-duty misconduct and the efficiency of the service. (See Order of February 13, 1984, denying cross-motions for summary judgment.)

It is clear that, at the time Mr. Gregory sought reinstatement in November 1982, GAO had a reasonable basis for believing that he had engaged in the alleged off-duty misconduct, for at that time Mr. Gregory had been, and remained, criminally indicted by a grand jury. At the hearing GAO raised three primary concerns which it asserted as establishing a nexus between the alleged misconduct and the efficiency of the service: (1) the safety of GAO's female employees, (2) Mr. Gregory's access to classified materials, and (3) GAO's reputation and image with Congress and other agencies.

The record shows that when suspended in May 1982, Mr. Gregory was employed as an Evaluator, job series 347, GS-12, in the Washington Regional Office (WRO) of the GAO. He had worked there approximately 3-1/2 months and, at the time of his suspension, was involved in an evaluation of the Defense Fuel Supply Center under the immediate supervision of the Ms. Edith Pyles and the secondary supervision of Ms. Gloria Mayer, Assistant Regional Manager. Prior to that, Mr. Gregory had been employed, for approximately 3-1/2 years, in GAO's Human Resources Division. In both in his assigned areas of employment with the GAO, the record is uncontroverted that Mr. Gregory had a positive rapport with the people he worked with, both inside and outside of the agency, and a good performance record. In the course of his duties, Mr. Gregory, as would most evaluators, would have occasion to work in close proximity and relative isolation with other evaluators and/or representatives of other agencies, including females. It was also established that Mr. Gregory had a security clearance and may or may not have been exposed to classified documents during the terms of his service on the evaluation of the Defense Fuel Supply Center. The record further shows that, as a WRO Evaluator, Mr. Gregory could have occasion to deal with high-ranking officials of other agencies as well as with Congressmen and/or their staff, but only with the permission of, if not accompanied by, his immediate supervisor.

The Presiding Member finds that GAO has not established a nexus between Mr. Gregory's misconduct and his potential access to classified materials. No evidence was presented to link his misconduct with any future compromise of national security interests. No suggestion was made, for example, that Mr. Gregory,

whose criminal indictment was a matter of public record and known to GAO management, would be more prone to blackmail than would any other evaluator with access to classified materials.

The Presiding Member also finds that GAO has not established a nexus between Mr. Gregory's misconduct and harm to GAO's reputation and image with Congress and other agencies. The record does not show that there was any public notoriety associated with his arrest, indictment, or mistrial. Thus there is no basis for presuming that members of Congress or officials of other agencies would hold GAO in lower repute because it employed an evaluator who had engaged in such misconduct, for there is no basis for presuming such officials would ever learn of Mr. Gregory's actions.

The concern for the safety of female employees presents a different question, however. Both Mr. Littleton, the Regional Manager, and Ms. Mayer, the Assistant Regional Manager, testified that, given the charges of sexual misconduct of a violent nature,³ they were concerned for the safety of the female employees that Mr. Gregory may have occasion to work with in close proximity and isolated locations (35 to 40% of WRO's employees are females). Indeed, at the time of his arrest, Mr. Gregory was working directly with Edith Pyles. On the other hand, it is clear that management made a determination not to inform Mr. Gregory's fellow employees of the serious charges against him, and thus there was no basis for knowing whether or not those employees would have real apprehensions of continuing to work with him. Nevertheless, as Regional Manager, Mr. Littleton had ultimate responsibility for insuring the on-the-job safety of WRO's employees to the extent reasonably possible. He was entitled to exercise his judgment and not take the risk of endangering female employees by requiring them to work alongside an employee charged with a violent sexual assault. He was not required to sit by and hope that such conduct would not be repeated in the work setting, which often included travel and isolated settings.

Therefore, the Presiding Member finds that GAO has established that legitimate concerns for the safety of female employees provides the required nexus between Mr. Gregory's off-duty misconduct and the efficiency of the service.

The petition for review is dismissed.

ORDER

The motion for reconsideration has been considered by the full Board, and the decision of the Presiding Member is affirmed.

Notes

1. Prior to the hearing in this case, on July 8, 1983, Mr. Gregory was retried in the Cecil County Court and was found guilty of assault with intent to commit a second-degree sexual offense. A sentence of imprisonment was imposed. The conviction and sentence are on appeal in the courts. Thereafter, Mr. Gregory was terminated by GAO. The propriety of the termination is not before the Board in this proceeding.

2. See 31 U.S.C. §732(d)(4) for application of 5 U.S.C. §7513 to GAO. See also GAO Order 2752.1, Chapter 3.

3. Although the original charges were reduced before trial, Mr. Gregory was still charged with assault, battery, and assault with intent to commit a second-degree sexual offense. (A second-degree sexual offense consists of engaging in a sexual act, other than intercourse, by force or threat of force against another person's will. Md Code, Art. 27, §464A.) Testimony at the hearing revealed that the agency viewed the reduced charges as still evidencing a serious sexual assault. The agency based its denial of Mr. Gregory's reinstatement request in November 1982 on the same reasons as its initial decision to suspend in May 1982.